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Decolonising Copyright: Reconsidering Copyright Exclusivity and the Role of the Public Interest in International Intellectual Property Frameworks

International intellectual property frameworks conceive of copyright exclusivity as a largely individualistic, westernised and capitalistic benefit which must be balanced against and limited by the non-commercial, competing public interest. This is expressed primarily by way of limitations to and exceptions from the norm of exclusivity recognised within these frameworks. This article argues for an alternative interpretation of copyright exclusivity as being justified by the public interest. However, unlike the works of Geiger et al., this interpretation is not premised upon the constitutional and quasi-constitutional patterns accounting for the public interest foundations of IP. Instead, it is premised upon the conceptualisations of indigenous communities within the Global South relating to exclusivity over intangible property for the communal benefit. This article argues that a paradigm shift in the international community at a supranational level, such as the removal of the TRIPS Agreement from the WTO, is needed in order to better reflect the norms and values of the Global South. By reassessing the nature of copyright exclusivity rather than delegating conversations about non-commercial communal needs to limitations and exceptions, the Global South is no longer seen as mere passive receptors of Western norms and values, but as active participants with inherent value in the creation of a truly global IP framework.

I. Introduction

This article will present a higher-level critique pertaining to the role of the public interest in the current global intellectual property (IP) framework. It will be explained that the international IP system understands copyright exclusivity as a largely individualistic and commercial benefit which exists alongside limitations and exceptions which detract from this exclusivity so as to accommodate the demands of the public interest. In so far as the individualistic justification for copyright exclusivity adopted within the international IP framework falls short when applied to the Global South, so-called flexibilities exist with which to create limitations and exceptions in the public interest.

This article proposes a radical paradigm shift in arguing for the adoption of an indigenous-inspired understanding of copyright exclusivity whereby the public interest is a central justification for this exclusivity rather than an exception to it. In this way, considerations of the Global South as a group of nation states in delayed stages of development which require deviations from the developed norm of exclusivity are altered to a less patronising contemplation of the Global South as a distinct socio-cultural body capable of offering a unique alternative (or at least, an additional) interpretation of copyright exclusivity itself. This counter-hegemonic interpretation envisions copyright exclusivity being justified by way of the public interest, premised upon the understanding of individual exclusivity as a communal rather than individual benefit within indigenous communities in the Global South. In other words, this article reimagines copyright exclusivity as not being

limited by the wider public interest, but finding its legitimacy within the public interest. This newly-envisioned symbiotic relationship between the wider public interest and copyright exclusivity is used to reject the false narrative evidenced within the literature which presents a largely binary choice between the international norm of copyright exclusivity and the protection of the wider public interest.

It will conclude by considering, in turn, four possible means of addressing this issue as posited by the academic community: the creation of a constitutional clause pertaining to IP; interpreting the Agreement on Trade-Related Aspects of Intellectual Property ('TRIPS Agreement') through a 'pro-development' lens; the removal of the TRIPS Agreement *in toto*; and the removal of the TRIPS Agreement from the World Trade Organisation (WTO).

II. Copyright exclusivity and the contested role of the public interest

IP consists of many different facets: copyright, trademark, design law, patents and so on. The essence of copyright is to create property rights in the subject-matter of protection – despite its intangible nature making it easily divisible, IP is an essentially exclusive regime which incentivises and rewards creators with a limited monopoly over a bundle of ownership rights.¹ This bundle of rights usually

¹ Severine Dusollier, 'Intellectual Property and the Bundle-of-Rights Metaphor' in G Ghidini and others (eds), *KRITIKA: Essays on Intellectual Property* (Edward Elgar 2020) 1; Robert M Sherwood, *Intellectual Property and Economic Development* (Routledge 2019) 2; Ruth L Okediji, 'The Limits of International Copyright Exceptions for Developing Countries' (2019) 21 *Vanderbilt Journal of Entertainment and Technology Law* 689; Glory Onoyeyan, 'Copyright Law and Photocopying Practice in Nigeria' (2018) 2179 *Library Philosophy and*

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rest initially with the copyright owner. These include, for example, the right to reproduce, transfer, license or broadcast his or her intellectual property. The various rights the owner has in his or her intangible property are proprietary in nature, even though the subject-matter is not tangible property, making it easily divisible. For example, a copyright owner could choose to sell the rights to turn his book into a cinematographic film while also selling his rights in the same book to another individual who would like to put selected text to music in a song. In other words, the rights of the copyright owner are easily ‘unbundled’ in a way that would not be possible with tangible property – one cannot simultaneously sell one’s television set to X while also purporting to rent it out to Y.²

In the Western, capitalist framework whereby individual entrepreneurship is highly regarded, IP exclusivity in copyright is considered a largely individual benefit afforded to the creator of an original work which rewards them with a limited monopoly that will enable him or her to exploit the fruits of their labour, most often for financial or commercial gain, and in turn incentivise further creativity. For example, the ability to license one’s IP is a fundamental tool for diffusing innovation, for allowing innovators to be rewarded for their efforts, and to promote co-operation and follow-on innovation during IP rights’ period of exclusivity.³ While there are moral justifications for IP exclusivity, these are – like the economic ones – premised upon a capitalistic envisioning of the individual creator’s interest in seeing his or her creations monopolised in their favour.⁴

Practice (e-journal) 1; Lee-Ann Tong, ‘Aligning the South African intellectual property system with traditional knowledge protection’ (2017) 12 *Journal of Intellectual Property Law & Practice* 179; Peter Drahos, *Philosophy of Intellectual Property* (Routledge 2016) 1; Robert Merges, ‘What Kind of Rights are Intellectual Property Rights’ in Rochelle Dreyfuss and Justine Pila (eds), *The Oxford Handbook of Intellectual Property Law* (Oxford University Press 2018) 59; Adam Mossoff, ‘Is Copyright Property?’ (2005) 42 *San Diego Law Review* 29; Michel Vivant, ‘Intellectual Property Rights and their Functions: Determining their Legitimate Enclosure’ in Gustavo Ghidini and others (eds), *KRITIKA: Essays on Intellectual Property* (Edward Elgar 2017) 47.

² World Intellectual Property Organization, ‘WIPO Guide on the Licensing of Copyright and Related Rights’ (WIPO 2004) 43; World Intellectual Property Organization, ‘Creative Expression: An Introduction to Copyright and Related Rights for Small and Medium-sized Enterprises’ (WIPO 2006) 3-7.

³ Sherwood (n 1); Tong (n 1); Edward Shizha, ‘African Indigenous Perspectives on Technology’ in Gloria Emeagwali and Edward Shizha (eds), *African Indigenous Knowledge and the Sciences: Journeys into the Past and Present* (SensePublishers-Rotterdam 2016) 47; Wanjiku Karanja, ‘The Legitimacy of Indigenous Intellectual Property Rights’ Claims’ (2016) 1 *Strathmore Law Review* 165; Adebambo Adewopo, ‘The Global Intellectual Property System and Sub-Saharan Africa – A Prognostic Reflection’ (2002) 33 *University of Toledo Law Review* 749; Organisation for Economic Co-operation and Development, ‘Directorate for financial and enterprise affairs committee’ (OECD, 29 April 2019) <[https://one.oecd.org/document/DAF/COMP\(2019\)3/en/pdf](https://one.oecd.org/document/DAF/COMP(2019)3/en/pdf)> accessed 8 September 2020; Inside View: The Myth Of IP Incentives For All Nations – Q&A With Carlos Correa (*IP Watch*, 20 June 2018) <<https://www.ip-watch.org/2018/06/20/myth-ip-incentives-nations-qa-carlos-correa/>> accessed 6 September 2020.

⁴ Graham Dutfield and Uma Suthersanen, *Dutfield and Suthersanen on Global Intellectual Property Law* (2nd edn, Edward Elgar Publishing 2020) 18; Mikhalien du Bois, ‘Justificatory theories for intellectual property viewed through the constitutional prism’ (2018) 21 *Potchefstroom Electronic Law Journal* 1; Pamela Samuelson, ‘Chapter 1: Justifications for copyright limitations and exceptions’ in Ruth L Okediji (ed), *Copyright Law in an Age of Limitations and Exceptions* (Cambridge University Press 2018) 12; Christophe Geiger, ‘Chapter 3: Copyright as an access right: Securing cultural participation through the protection of creators’ interests’ in Rebecca Giblin and Kimberlee Weatherall (eds), *What if we could reimagine copyright?* (Australian National University Press 2017) 73; Peter Drahos, *Philosophy of Intellectual Property*

1. The public interest as limitations to and exceptions from exclusivity

This largely individualistic and economic incentivisation theory which provides the primary justification for copyright exclusivity in the West belies the interests of other members of the community, in so far as the public interest is concerned, it centres on the furtherance of economic or commercial rather than broader, social interests. For this reason, IP systems must, according to international standards, balance the protection and enforcement of IP rights expressed through exclusivity with the public interest considerations which support a deviation from this exclusivity. These deviations due to the wider public interest are expressed in international terminology by way of limitations or exceptions to the bundle of rights enjoyed exclusively by the copyright owner.⁵

This distinction between a private benefit expressed through exclusivity and the public interest expressed through exceptions and limitations can be seen in Arts. 7 and 8 of the TRIPS Agreement. Article 7 takes cognisance of the competing interests of producers and users of technological knowledge and calls for an equitable balancing of these interests, stating that IP rights must be used ‘in a manner conducive to social and economic welfare, and to a balance of rights and obligations’. This should be interpreted in line with Art. 8, which ‘formulates the general guidelines to be observed by WTO members when they adopt exceptions to the exclusive rights conferred by IPRs’.⁶ It states the following principle:

Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.

Examples of limitations or exceptions in the public interest are the inclusion of a disability exception whereby print-disabled members of the community may freely translate literary works into accessible formats,⁷ and

(Routledge 2016); Sadulla Karjiker, ‘Justifications for copyright: The economic justifications’ (2014) 2 *South African Intellectual Property Law Journal* 13; Sadulla Karjiker, ‘Justifications for copyright: The moral justifications’ (2013) 1 *South African Intellectual Property Law Journal* 42; Sol Picciotto, ‘Private Rights vs. Public Interests in the TRIPS Agreement’ (2003) 97 *Proceedings of the Annual Meeting (American Society of International Law)* 167.

⁵ World Trade Organization, ‘Intellectual property and the public interest’ <https://www.wto.org/english/tratop_e/trips_e/trips_and_public_interest_e.htm> accessed 6 September 2020; Jeremy de Beer, ‘Chapter 5: Making copyright markets work for creators, consumers and the public interest’ in Giblin and Weatherall (n 4) 147; World Intellectual Property Organization, ‘WIPO/CR/GE/19 International Conference on Copyright Limitations and Exceptions for Libraries, Archives, Museums and Educational & Research Institutions’ <https://www.wipo.int/meetings/en/details.jsp?meeting_id=53646> accessed 6 September 2020; WIPO Guide on the Licensing of Copyright and Related Rights (n 2) 43; World Intellectual Property Organization, ‘Creative Expression: An Introduction to Copyright and Related Rights for Small and Medium-sized Enterprises’ (WIPO 2006) 3-7; ‘Inside View: The Myth Of IP Incentives For All Nations’ (n 3).

⁶ Edson Beas Rodrigues Jr, *The General Exception Clauses of the TRIPS Agreement: Promoting Sustainable Development* (Cambridge University Press 2012) 45.

⁷ For more on this, see: Jade Kouletakis, ‘No Man Is an Island: A Critical Analysis of the UK’s Implementation of the Marrakesh Treaty’ (2020) 17 *SCRIPTed* 54; Laurence R Helfer and others, ‘Copyright Exceptions Across Borders: Implementing the Marrakesh Treaty’ (2020) 42 *EIPR* 332; Laetitia Cassells, ‘The Impact of the Marrakesh Treaty on South African Publishers’ [2020] *Publishing Research Quarterly* 1; Jade Kouletakis, ‘A critical examination of copyright limitations and

allowing for protected works to be utilised for educational purposes.⁸ In both of these examples, the exceptions from the individual's ownership right is justified because of a wider social interest that is of greater importance for the community's development. In the first example, marginalised sectors of society are better able to realise their human rights pertaining to political participation, a cultural life, access to education and so on. In the second example, educators are better able to express and transfer their knowledge by way of providing students with comprehensive illustrations and materials. In both instances, this is beneficial for the public in question because a better quality of education and a more integrated disabled community means a more socially, politically and economically active citizenry.

However, these limitations and exceptions are themselves the subject of much academic debate. While exceptions and limitations exist in international IP law, they are often underutilised by the Global South for reasons ranging from lack of national infrastructure to implement them domestically to legal uncertainty as to their scope and content.⁹ There have long been innumerable calls amongst academics and developing nations alike for greater flexibility to be afforded by the international IP community in relation to the exercise of limitations and exceptions.¹⁰ Perhaps the most novel offering in

addressing these deep-rooted concerns is that put forth by Okediji, who argues that a 'one-size-fits-all' view of IP limitations and exceptions is not appropriate in the context of developing nations which require a more responsive approach to societal needs. Instead, Okediji suggests that limitations and exceptions should be reframed according to the economic and developmental need of each Member State.¹¹ In essence, Okediji sums up her position as follows:

'Scholars usually describe L&Es as purposive tools to aid copyright law in achieving its public interest ends [...]. L&Es can help correct copyright's tilt toward stronger property rights; but designing L&Es primarily as balancing tools is a second-best approach to resolving a fundamental mismatch between what society formally desires of copyright [...] and the multifaceted and complex institutional demands that are vital in the development process. Conceiving of L&Es as a tool to achieve copyright goals reduces the pressure to design copyright to serve socially beneficial goals [...]. If copyright law is to have an important role in promoting economic growth and development, it has to look different in developing countries.'¹²

Okediji therefore proposes the creation of 'liberty-enhancing' limitations and exceptions that promote the public interest and which are mandatory on an international level yet still flexible in their domestic implementation, leaving some room for cultural autonomy and meeting the requirements of the so-called 'three-step test' under the TRIPS Agreement.¹³

2. Reimagining copyright exclusivity in the public interest

While Okediji offers an attractive solution to the concerns raised above, this article contributes to the new and exciting dialogue underway by suggesting an altogether more radical and fundamental alternative: instead of focussing on achieving greater flexibility and national responsiveness as it relates to copyright limitations and exceptions, a reassessment of the way in which copyright exclusivity is itself justified – particularly in relation to the Global South – is necessary.

exceptions for the visually impaired pertaining to literary works in South Africa in the local and global context' (2016) 2 South African Intellectual Property Law Journal 42.

⁸ For more on this, see: Klaus D Beiter, 'Extraterritorial human rights obligations to "civilize" intellectual property law: Access to textbooks in Africa, copyright, and the right to education' (2020) 23 Journal of World Intellectual Property 232; Robert J Congleton and Sharon Q Yang, 'A Comparative Study of Education Exemptions to Copyright in the United States and Europe' (2017) 3 Athens Journal of Law 47; Deidre A Keller and Anjali S Vats, 'Centering Education in the Next Great Copyright Act: A Response to Professor Jaszi' (2016) 54 Duquesne Law Review 173; E Beas Rodrigues Jr, 'Chapter 8: Copyright and the educational exception for underprivileged students and researchers' in E Beas Rodrigues Jr, *The General Exception Clauses of the TRIPS Agreement: Promoting Sustainable Development* (Cambridge University Press 2012) 292.

⁹ Okediji (n 1); Yousouf A Vawda, 'Analysing South Africa's compulsory licensing jurisprudence: is there room for the public interest (PI) in intellectual property (IP)?' (2019) 7 South African Intellectual Property Law Journal 182; Jade Kouletakis, 'The language of western homogeneity: a rose by any other name is a potential lawsuit' (2016) 6 Queen Mary Journal of Intellectual Property 392; Sopeolu O Adegoke, 'Intellectual Property in Sub-Saharan Africa' (Senior thesis, Claremont McKenna College 2011); George M Sikoyo and others (eds), 'Intellectual Property Protection in Africa: Status of Laws, Research and Policy Analysis in Ghana, Kenya, Nigeria, South Africa and Uganda' (African Centre for Technology Studies Ecopolicy Series No 16 2006).

¹⁰ While not a complete list, the author recommends the following in particular: Margaret Chon, 'Recasting Intellectual Property in Light of the U.N. Sustainable Development Goals: Toward Global Knowledge Governance' (2019) 34 American University International Law Review 763; Ruth L Okediji, 'Does intellectual property need human rights?' (2018) 51 New York University Journal of International Law and Politics 1-68; Alphonso B Kassor, 'The World Trade Organization's Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement: The Compelling Challenges for Developing and Less Developed Member Countries-Implementation and Enforcement' (2018) 9 Cybaris: An Intellectual Property Law Review 107; Caroline Ncube, 'Chapter 8: Calibrating copyright for creators and consumers: Promoting distributive justice and Ubuntu' in Giblin and Weatherall (n 4) 253; Walter G Park, 'Averting a TRIPSxit from the Global Intellectual Property System' (2017) 24 4 George Mason Law Review 883; Eric M Solovy and Pavan S Krishnamurthy, 'TRIPS Agreement Flexibilities and Their Limitations: A Response to the UN Secretary-General's High Level Panel Report on Access to Medicines' (2017) 50 1 George Washington International Law Review 69; Rebecca Giblin and Kimberlee Weatherall, 'Chapter 1: If we redesigned copyright from scratch, what might it look like?' in Giblin and Weatherall (n 4) 1; Kouletakis (n 9); Miranda Forsyth, 'Making the Case for a Pluralistic Approach to Intellectual Property Regulation in Developing Countries' (2016) 6 Queen Mary

Journal of Intellectual Property 3; J Janewa OseiTutu, 'Human Development as a Core Objective of Global Intellectual Property' (2016) 105 Kentucky Law Journal 1; Juan He, 'Developing Countries' Pursuit of an Intellectual Property Law Balance under the WTO TRIPS Agreement' (2011) 10 Chinese Journal of International Law 827; Kanchana Kariyawasam and Scott Guy, 'Intellectual Property Protection of Indigenous Knowledge: Implementing Initiatives at National and Regional Levels' (2003) 12 Deakin Law Review 101; Enyinna S Nwauche, 'An Evaluation of the African Regional Intellectual Property Right Systems' (2003) 6 Journal World Intellectual Property 101; Laurence R Helfer, 'Human Rights and Intellectual Property: Conflict or Coexistence?' (2003) 5 Minnesota Intellectual Property Review 47.

¹¹ Okediji (n 1); Ruth L Okediji, 'Chapter 14: Reframing international copyright limitations and exceptions as development policy' in Okediji (n 4) 429; Ruth Okediji, '8th Annual Peter A. Jaszi Distinguished Lecture on Intellectual Property: The Unfinished Business of Copyright Limitations and Exceptions' <<http://infojustice.org/archives/41666>> accessed 6 September 2020.

¹² Okediji, 'Chapter 14: Reframing international copyright limitations and exceptions as development policy' (n 11) 483.

¹³ Okediji (n 1).

This article proposes that the current international copyright system is inadequate in so far as it fails to centralise the public interest, not in relation to deviations from copyright exclusivity, but in relation to the rationale for affording copyright exclusivity in the first place. Copyright exclusivity should not compete with the public interest, but find its legitimacy within the public interest. This is particularly important in so far as it applies to the Global South where indigenous justifications for exclusivity of intangible property were and are inseparable from the communal interest. It is also important to note that this concept of the communal interest is not necessarily connected to capitalistic issues of economics or commercial exploitation.

While it must be stressed that there is no homogenous 'traditional Global South society' which exercises a single system of law, let alone a single 'indigenous community' which does the same, there are strong similarities between the different ethnic tribes in so far as their treatment of intangible property is concerned. Conventional copyright discourse tends to focus on the Western, capitalist notion of IP exclusivity as expressed above being diametrically opposed to the indigenous Global South's comprehension underlying those concepts, usually with reference to the current international IP regime failing to adequately protect or recognise the collective rights aspect of ownership to intangible property practiced within these traditional communities. Such an opposition between tradition and modernity became a key assumption of post-World War II modernisation theory whereby social and cultural evolution could be best understood in terms of progress that would entail the replacement of terms applicable to indigenous societies such as 'community', 'patron-client relationship', 'routine', and 'solidarity', with their modern and assumed polar opposite counterparts of 'individual', 'bureaucratic relationships', 'innovation' and 'competition'. As Dutfield highlights, since evidence of progress essentially entailed the latter terms applying rather than the former ones, there was little accommodation for hybridity including its positive aspects for indigenous and Western societies. These basic assumptions have proved to be highly resilient.¹⁴

Although much has rightly been written about the inability of the current IP regime to effectively protect or recognise collective rights, this important dialogue has perhaps resulted in the overshadowing of a substantial similarity between these two supposedly mutually exclusive systems, namely the recognition afforded to both collective and individual exclusivity in relation to intangible property within these indigenous communities. In fact, literature across many indigenous societies in the Global South spanning many decades has found that various levels of ownership – ranging from individual rights to family rights through to community or village rights and even national rights – exist within such communities.¹⁵ These

exclusionary 'rights' oftentimes appear superficially similar to those of the Western IP system, as per Ouma:

'In the case of music, specific composers within [indigenous and local communities] are often rewarded for their creativity by being recognised as custodians of the compositions. Certain forms of artwork and design often belong to certain members of [indigenous and local communities]. Many types of [traditional knowledge] held by [indigenous and local communities] in Kenya, and in East Africa more generally, are thus kept within the custody of a selected few, to the exclusion of all others.'¹⁶

A substantive difference is that, even though it is possible for the individual to hold said rights to exclusivity in these traditional communities, the individual is enabled to do so because of a commitment to the common interest.¹⁷ For example, traditional African societies are motivated

Commercialization and Humanization of Traditional Knowledge' (2018) 20 San Diego International Law Journal 71; Hugo DeBlock, 'Property and Ownership in Vanuatu: The Lengnangulung Sacred Stone from North Ambrym at the Pavillon des Sessions of the Musée du Louvre' (2017) 40 Museum Anthropology 111; Gregory Younging, 'Traditional Knowledge Exists; Intellectual Property Is Invented or Created' (2015) 36 University of Pennsylvania Journal of International Law 1077; United Nations Conference on Trade and Development, 'The Convention on Biodiversity and the Nagoya Protocol: Intellectual Property Implications' <https://unctad.org/en/PublicationsLibrary/diaepcb2014d3_en.pdf> accessed 6 September 2020; World Intellectual Property Organization, 'WIPO/GRTKF/IC/13/5(B) REV. The Protection of Traditional Knowledge: Draft Gap Analysis: Revision' <https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=109672> accessed 6 September 2020; Jacob L. Simeet, 'Copyrighting Traditional Tolai Knowledge' in Kathy Whimp and Mark Busse, *Protection of Intellectual, Biological & Cultural Property in Papua New Guinea* (Australian National University Press 2013) 62; Hal B. Levine, 'Claiming Indigenous Rights to Culture, Flora, and Fauna: A Contemporary Case from New Zealand' (2010) 33 Political and Legal Anthropology Review 36; Nicolas Brahy, *The Property Regime of Biodiversity and Traditional Knowledge: Institutions for Conservation and Innovation* (Larcier 2008) 26; Silke von Lewinski, *Indigenous Heritage and Intellectual Property: Genetic Resources, Traditional Knowledge and Folklore* (Kluwer Law International 2008) 17-18; Loretta Feris, 'Protecting traditional knowledge in Africa: Considering African approaches' (2004) 4 African Human Rights Law Journal 242, 253; Chika B. Onwuekwue, 'The Commons Concept and Intellectual Property Rights Regime: Whither Plant Genetic Resources and Traditional Knowledge?' (2004) 2 Pierce Law Review 65; World Intellectual Property Organization, 'WIPO Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge (1998-1999)' <https://www.wipo.int/edocs/pubdocs/en/tk/768/wipo_pub_768.pdf> accessed 6 September 2020; Darrell A. Posey and Graham Dutfield, *Beyond Intellectual Property: Toward Traditional Resource Rights for Indigenous Peoples and Local Communities* (International Development Research Centre 1996) 60.

¹⁶ Marisella Ouma, 'Chapter 6: The Policy Context for a Commons-Based Approach to Traditional Knowledge in Kenya' in Jeremy de Beer and others (eds), *Innovation and intellectual property: Collaborative dynamics in Africa* (University of Cape Town Press 2014) 132.

¹⁷ For example, see: Zubair Ahmed Khan, 'Chapter 6: Challenges Related to Protection of Indigenous Resources Against Biopiracy' in Nisha Dewani and others (eds), *Intellectual Property Rights and the Protection of Traditional Knowledge* (IGI Global 2019) 124; Carys J. Craig, 'Chapter 17: Critical copyright law and the politics of IP' in Emiliós Christodoulidis and others (eds), *Research Handbook on Critical Legal Theory* (Edward Elgar Publishing 2019) 301; Adebambo Adewopo, 'The Global Intellectual Property System and Sub-Saharan Africa – A Prognostic Reflection' (2002) 33 University of Toledo Law Review 749, 753; Caroline Ncube, 'Three centuries and counting: The emergence and development of intellectual property law in Africa' in Dreyfuss and Pila (n 1) 409; Freedom-Kai Phillips, 'Intellectual Property Rights in Traditional Knowledge: Enabler of Sustainable Development' (2018) 32 Utrecht Journal of International and European Law 1; Tong (n 1); Shizha (n 3); Caroline JS Picart and Marlowe Fox, 'Beyond Unbridled Optimism and Fear: Indigenous Peoples, Intellectual Property, Human Rights and the Globalization of Traditional Knowledge and Expressions of Folklore: Part I' (2013) 15 International Community Law Review 319; von Lewinski (n 15) 18.

¹⁴ Graham Dutfield, 'TK unlimited: The emerging but incoherent international law of traditional knowledge protection' (2017) 20 Journal of World Intellectual Property 144, 147.

¹⁵ For example, see: Paul Kuruk, *Traditional Knowledge, Genetic Resources, Customary Law and Intellectual Property: A Global Primer* (Edward Elgar Publishing 2020) 3.3; Ayoyemi Lawal Arowolo, 'African Traditional Intellectual Property Rights, Customary Law, and Legal Pluralism' (2018-2019) 11 African Journal of Legal Studies 299; Shizha (n 3); Julie Yassine, 'IP Rights and Indigenous Rights: Between

in part to observe all sort of norms by their common interests, including justifying the recognition afforded to rights of exclusivity as it relates to intangible property. As explained by Arowolo:

'In intangible property, the right to use and not the right to own or both is recognised [...]. Exclusive rights are provided by the identification of certain groups or individuals as having the rights to manufacture or produce certain commodities [...]. Each member of the community has individual rights which are usually accompanied by collective responsibilities. These responsibilities could be fiduciary in nature or just a duty of care to the community [...]. Individualism exists within communalism without having to accept the western concept of individualism. The rights of the individual as well as the collective are recognized.'¹⁸

By framing the non-commercial (from the Western perspective) public or communal interest as that which is primarily expressed and protected through exceptions or limitations to the general rule of exclusivity, the international community risks alienating the Global South whose own historical and cultural frame of reference is not adequately reflected in so far as it concerns the purpose for which proprietary exclusivity is granted in the first instance.¹⁹

While the current IP system was created in the developed world steadily over many centuries, this same regime was largely thrust upon the Global South as a by-product of colonialism.²⁰ The current IP framework as implemented in the Global South was not the holistic answer to commercial problems as it was in the West, but the answer to a question nobody had ever asked, whether they liked it or not. Global power relationships evident at the negotiating table on the international arena reflect longstanding global power hierarchies, particularly in relation to the cultural gatekeeping of the south by the West.²¹ For example, Gana views the TRIPS Agreement as a form of passive coercion which requires the Global South to abide by the particular forms of protection for intellectual goods as a condition to membership in the new multilateral trading system despite this sometimes

being to their cultural detriment. The author argues that the standards in the TRIPS Agreement are at times both incompatible with cultural institutions within these societies and invalid under local law and custom, thus raising a significant point of conflict between developing country governments and traditional societies which are constituents of these countries.²² As Drahos eloquently puts it, 'The claim that the TRIPS negotiations were a model of transparency is difficult to defend. In truth, it was the transparency of a one-way mirror'.²³ An appreciation for these hierarchies of culture in the development of global intellectual property standards is important for it is what enabled Western socio-political beliefs expressed through individualistic, pro-capitalist frames of reference regarding the justifications for IP exclusivity to take preference over those of the Global South in the formulation of what are today considered universal IP norms and values. By reassessing the nature of copyright exclusivity rather than delegating such conversations to limitations and exceptions, the Global South is no longer seen as mere passive receptors of Western norms and values, but as participants with autonomous agency having inherent value reflected within a truly global IP framework.

It is important that such a paradigm shift takes place within the international community if it is to maximise global innovation, creativity and socio-economic developments. This is because it will need a stronger and more wide-ranging consensus on the importance of IP to every country in the world, regardless of economic or political positioning, if it is to make faster progress on commonly shared global challenges and aspirations such as economic growth, rights realisations and technological developments. All countries must see value in a shared framework that purports to reflect shared ideologies in order to 'buy-in' to said structures.²⁴ The weaponisation of international minimum standards and frameworks as tools for 'civilising' the Global South means that the realisation of these universally important goals will remain out of reach unless a novel approach to obligations and accountability is adopted.²⁵

It must be stressed that this article is not purporting to concern itself with the complex and controversial question of whether IP rights are a suitable vehicle for protecting traditional knowledge – that is not the ambit of this article. What is being suggested is that the current IP system might instead learn from the principle of common interest which underscores indigenous communities' understanding of exclusivity in intangible property, and in this way better reflect the norms and values of the Global South.

¹⁸ Arowolo (n 15) 301-309.

¹⁹ Louise van Greunen and Iva Gobac, 'Building respect for intellectual property – The journey toward balanced intellectual property enforcement' (2020) 24 *Journal of World Intellectual Property* 1; Adegoke (n 9); Sikoyo and others (n 9).

²⁰ For an in-depth study of the history relating to copyright pre-and-post independence in Africa, the author recommends the following: Uma Suthersanen and Ysolde Gendreau (eds), *A Shifting Empire: 100 Years of the Copyright Act 1911* (Edward Elgar Publishing 2020); Marisella Ouma, 'Chapter 7: Evolutions of Copyright Law in Africa: Compatibility with International Norms and Directions' in Tatiana Eleni Synodinou, *The Pluralism or Universalism Dilemma in International Copyright Law* (Wolters Kluwer 2019); Adebambo Adewopo, 'Copyright Legacy and Developing Countries: Important Lessons for Nigeria's Emerging Copyright Reform' in J Gilchrist and B Fitzgerald (eds), *Copyright, Property and the Social Contract* (Springer International Publishing 2018) 3; Emmanuel Kolawole Oke, 'Territoriality in Intellectual Property Law: Examining the Tension between Securing Societal Goals and Treating Intellectual Property as an Investment Asset' (2018) 15 *SCRIPTed* 313; Lydia Lundstedt, *Territoriality in Intellectual Property Law* (Stockholm University 2016) 91; Olufunmilayo B Arewa, 'TRIPS and Traditional Knowledge: Local Communities, Local Knowledge, and Global Intellectual Property Frameworks' (2006) 10 *Marquette Intellectual Property Law Review* 155; Sikoyo and others (n 9).

²¹ Suthersanen and Gendreau (n 20); Wanjiku Karanja, 'The Legitimacy of Indigenous Intellectual Property Rights' Claims' (2016) 1 *Strathmore Law Review* 165; Adegoke (n 9); Sikoyo and others (n 9).

²² Ruth L Gana, 'Has Creativity Died in the Third World - Some Implications of the Internationalization of Intellectual Property' (1995) 24 *Denver Journal of International Law and Policy* 109.

²³ Peter Drahos, 'Chapter 10: Negotiating Intellectual Property Rights: Between Coercion and Dialogue' in Peter Drahos and Ruth Mayne (eds), *Global Intellectual Property Rights: Knowledge, Access and Development* (Palgrave Macmillan 2002) 169.

²⁴ van Greunen and Gobac (n 19); Stephen Ezell and Nigel Cory, 'The Way Forward for Intellectual Property Internationally' (*Information Technology and Innovation Foundation*, 25 April 2019) <<https://itif.org/publications/2019/04/25/way-forward-intellectual-property-internationally>> accessed 22 December 2020; Daniele Archibugi and Andrea Filippetti, 'The Globalisation of Intellectual Property Rights: Four Learned Lessons and Four Theses' (2010) 1 *Global Policy* 137; Adegoke (n 9).

²⁵ Beiter (n 8); Suthersanen and Gendreau (n 20).

Admittedly, this is an ambitious task. The Global South is generally and frankly defined by way of its supposed ‘delayed development’ and being in a state of perpetual ‘catch up’ with the West. However, an incorporation of the indigenous concept of communal interest by way of a centralisation of the public interest in terms of justifying exclusivity would change this dialogue by recognising the Global South’s unique and equal socio-political and cultural contribution toward the language of minimum standards over which they are themselves governed. By renegading the public interest to the realm of limitations and exceptions, the international IP framework ‘others’ what is perhaps one of the central features which has helped shape half of the world’s nations; hardly what one would expect of a global movement.

III. Pathways to centering the public interest in copyright exclusivity

There are various ways in which the literature has, to date, sought to address this inequality in the global IP framework. While some of these arguments are diametrically opposed to the position of this article, others may be read as supplementing the recommendations within. What follows is a consideration of each argument in turn, as well as a discussion of their strengths and weaknesses as they relate to the requirements set out in this article. This will include the final proposal, namely that the TRIPS Agreement be removed from the ambit of the WTO and placed in a different body, such as the United Nations Educational, Scientific and Cultural Organization (‘UNESCO’).

1. Creating a constitutional clause

Geiger argues that IP is not merely property but part of a broader social contract between the haves and have nots which must aim to achieve more than mere economic benefit; it must promote cultural and scientific progress in general.²⁶ The author posits that IP has lost this fundamental justification and recommends ‘a satisfying and balanced clause for IP at constitutional level, capable of demonstrating by its “mere” wording that intellectual property is intrinsically linked to the interests of society’ as a means of reinstating it. For example, Geiger suggests protection of IP under the freedom of arts and sciences or under the right to freedom of expression and information.

Geiger’s position is a highly attractive one, for it recognises the importance of the public interest not as a countervalue to IP exclusivity, but as a central justification for allowing that exclusivity in the first instance.

This article accepts and supports the broad substance of Geiger’s argument, namely that a conceptual shift is necessary where the public interest is repositioned as a justification for IP. It also accepts the choice of framing said argument in the language of international human rights law. However, there are some important

distinctions between the arguments made in this article compared to those of Geiger.

Fundamentally, this article has posited that there must be a radical shift of paradigm, moving ‘the public interest’ from the edges (i.e. limitations and exceptions) to the centre (i.e. exclusive rights) of the global IP framework. For Geiger, this shift of paradigm is not necessitated in the execution of his proposed constitutional clauses which are, in some respects, more radical than the position taken within this article. For example, Geiger suggests amending Art. 11 of the Charter of Fundamental Rights of the European Union to include protection of IP under Freedom of Expression and Information. The author does this in such a way that it would be the *freedom of use* that is considered the centre with exclusivity existing on the edges as the exception from the norm which must be justified. In this way, Geiger seeks not just to shift the paradigm of understanding through which the global IP framework interprets ‘the public interest’, but to flip the global IP framework in its entirety. It is not necessary – as per the premise of this article – to consider such an extreme proposal on its own merits when a less extreme alternative exists.

Unlike the works of Geiger, the interpretation of IP exclusivity within this article is not premised upon constitutional and quasi-constitutional patterns accounting for the historical public interest foundations of IP. Instead, it is premised upon the conceptualisations of indigenous communities within the Global South relating to exclusivity over intangible property for the communal benefit. This distinction is not insignificant. The arguments put forth by Geiger presuppose a shared historical sense or understanding of ‘the public interest’ as it related to IP. Indeed, the author uses the language of ‘(re)introducing’ the public interest to modern-world conversations about IP; a remembrance of our shared historical roots. Geiger seeks to justify this conceptual shift as a means of ‘helping the general public to accept and respect IP rights more willingly’ and thus aiding in the legitimacy of IP during modern times ‘of piracy and disillusion’.

Conversely, this article argues that a paradigm shift in the international community at a supranational level is needed in order to better reflect the norms and values of the Global South, and is therefore a matter of both social and historical justice – a cultural necessity. This article rejects the notion that the public interest, as understood by indigenous communities within the Global South, has ever been accepted by – much less incorporated within – the international consciousness relating to IP exclusivity. This article rejects the position that there has ever been a shared historical sense or understanding of ‘the public interest’ as it related to IP, which necessarily renders it impossible to ‘(re)introduce’ an ideal that never existed in the first place. As has been argued within this article, the historical realities of how the global IP framework initially permeated the Global South through colonial implantation and subjugation evidences the fact that ‘the public interest’ – as historically founded within classic notions of IP – has always been conceptualised from the point of view of the westernised, Global North to the exclusion of ‘others’. The cultural hegemony embedded within the current language of ‘public interest’ and ‘exclusivity’ has always been that of the dominant elites; on a global scale, this has systemically excluded the indigenous

²⁶ Christophe Geiger, ‘Chapter 35: Implementing Intellectual Property Provisions in Human Rights Instruments: Towards a New Social Contract for the Protection of Intangibles’ in Christophe Geiger, *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar Publishing 2016).

South who have historically either been ignored, or – more recently – relegated to conversations pertaining to traditional knowledge as a subset of core IP considerations.

2. Interpreting the TRIPS Agreement through a pro-development lens

Yu provides an assortment of suggestions for developing countries on how to make the best of an international IP system that ‘has provided many reasons why less developed countries are dissatisfied’.²⁷ These include that developing countries take advantage of the ‘many important public interest safeguards’ within the TRIPS Agreement, such as Arts. 7 and 8, and that the TRIPS Agreement be interpreted through a ‘pro-development lens’, namely interpreting these ambiguities to the country’s local advantage.²⁸

It has been argued that the TRIPS Agreement’s requirement for strong IPR protection is ‘increasingly out of phase with the shifting geopolitical dynamics of multilateralism in international relations’ whereby ‘human rights [have] become a progressively more influential factor in shaping trade and development policy’.²⁹ However, Beiter has convincingly countered that international human rights law can in fact be used as a tool for interpreting the provisions of the TRIPS Agreement from a ‘pro-development’ point of view to the benefit of the Global South. The author argues that doing so ‘supports substantial policy space for WTO members in the design of national IP law [...] so as to take account of national development and access needs’.³⁰

In principle, this approach is a highly attractive one which supplements the position taken within this article.

²⁷ Peter K Yu, ‘Chapter 20: Why are the TRIPS enforcement provisions ineffective?’ in Paul Torremans (ed), *Research Handbook on Cross-border Enforcement of Intellectual Property* (Edward Elgar 2014); Peter K Yu, ‘TRIPs and its discontents’ (2006) 10 *Marquette Intellectual Property Law Review* 369.

²⁸ Yu, ‘Chapter 20: Why are the TRIPS enforcement provisions ineffective?’ (n 27). This position has also been argued by the following: Johan Rochel, ‘Intellectual property and its foundations: Using Art. 7 and 8 to address the legitimacy of the TRIPS’ (2020) 23 *Journal of World Intellectual Property* 21; Daniel Gervais, *The TRIPS Agreement: Drafting History and Analysis* (4th edn, Sweet & Maxwell 2012); Amy Kapczynski, ‘Harmonization and its Discontents: A Case Study of TRIPS Implementation in India’s Pharmaceutical Sector’ (2009) 97 *California Law Review* 1571; Rochelle Cooper Dreyfuss, ‘TRIPS-Round II: Should Users Strike Back?’ (2004) 71 *The University of Chicago Law Review* 21; J H Reichman, ‘The TRIPS Agreement Comes of Age: Conflict or Cooperation with the Developing Countries?’ (2000) 32 *Case Western Reserve Journal of International Law* 441.

²⁹ Rudolph J R Peritz, ‘Introduction’ in Gustavo Ghidini and others (eds), *TRIPS and Developing Countries: Towards a New IP World Order?* (Edward Elgar 2014) 1.

³⁰ See: Klaus D Beiter, ‘Reductionist Intellectual Property Protection and Expansionist (and “Prodevelopment”) Competition Rules as a Human Rights Imperative? Enhancing Technology Transfer to the Global South’ (2021) 14 *Law and Development Review* 215; Klaus D Beiter, ‘Extraterritorial human rights obligations to “civilize” intellectual property law: Access to textbooks in Africa, copyright, and the right to education’ (2020) 23 *The Journal of World Intellectual Property* 232; Klaus D Beiter, ‘Establishing Conformity between TRIPS and Human Rights: Hierarchy in International Law, Human Rights Obligations of the WTO and Extraterritorial State Obligations under the International Covenant on Economic, Social and Cultural Rights’ in Hanns Ullrich and others (eds), *TRIPS plus 20: From Trade Rules to Market Principles* (Springer 2016). The interplay between human rights and IP – and the use of the former to promote a pro-developmental interpretation of the latter – is one which this author has also supported relating to access to textbooks for print-disabled persons and translations of literary works into minority languages, respectively. See Kouletakis (n 7); Kouletakis (n 9).

While the paradigm shift argued for in this article is radical, it is also moderate in tolerating ‘hybridity’ or condoning the existence of a plurality of models alongside each other in accordance with each country’s level of development. International human rights law provides an excellent, shared means by which to assess and realise this hybridity. However, in practice the ability of the Global South to interpret and apply the TRIPS Agreement from a ‘pro-developmental’ point of view is limited by many factors, including the lack of buy-in from the WTO and the threat of trade sanctions from the Global North.

There are many authors who have long highlighted the shortfalls of Arts. 7 and 8, questioning or rejecting the practical usefulness of these supposed ‘safeguards’ within the current international IP framework, e.g. pointing out how they have featured sparingly in the reasoning of the WTO Dispute Settlement Body (DSB) despite being reinforced in instruments like the Doha Declaration on TRIPS and Public Health. Being well-documented, it is not necessary within the scope of this article to consider each of these in turn.³¹ While the objectives of raising standards of living and sustainable development are included in the Preamble to the Agreement establishing the WTO, human rights and labour rights do not feature explicitly in the WTO mandate. In fact, the WTO has repeatedly been criticised by academics, civil society and trade unions for ignoring the direct consequences of trade liberalisation on labour standards and human rights. It has been hailed as giving rise to the international ‘race to the bottom’ in the area of labour standards and human rights, whereby countries in the Global South relax labour standards and related rights in order to attract foreign investment from the Global North.

A key power element of the WTO is that it can authorise the application of trade sanctions for breaches of its agreements. The coercive approach of trade threats with relation to IP enforcement and protection can perhaps best be illustrated by way of example relating to the South African Copyright Amendment Bill. The most contentious aspect of this Bill has been that it would introduce a generalised system of fair use into South Africa’s IP framework, replacing the previously – and more cumbersome – system of fair dealing. Presidential assent of the South African Copyright Amendment Bill has been delayed in light of the International Intellectual Property Alliance – an organisation representing large US

³¹ For an overview, the author recommends the following in particular: Alison Slade, ‘The Objectives and Principles of the WTO TRIPS Agreement: A Detailed Anatomy’ (2016) 53 *Osgoode Hall Law Journal* 948; Molly Land, ‘Chapter 6: Adjudicating TRIPS for development’ in Ghidini and others (n 29); James Otieno Odek, ‘Chapter 9: The illusion of the TRIPS Agreement to promote creativity and innovation in developing countries: Case study on Kenya’ in Ghidini and others (n 29); L Danielle Tully, ‘Prospects for Progress: The TRIPS Agreement and Developing Countries After the DOHA Conference’ (2003) 26 *Boston College and International and Comparative Law Review* 129; Ruth L Gana, ‘Prospects for Developing Countries under the TRIPS Agreement’ (1996) 29 *Vanderbilt Journal of Transnational Law* 735. It should also be noted that if international human rights are considered to impose extraterritorial obligations on states, the assumption is that, if TRIPS cannot be read harmoniously with human rights, states would be obliged to amend (or even abolish) TRIPS to prevent its rules violating the rights of those in other states (ie beyond a state’s borders). For more on this argument, see: Klaus D Beiter, ‘Not the African Copyright Pirate is Perverse, but the Situation in which (S)he Lives – Textbooks for Education, Extraterritorial Human Rights Obligations, and Constitutionalization “From Below” in IP Law’ (2021) 26 *Buffalo Human Rights Law Review* 1.

entertainment companies – asking the US Trade Representative to sanction South Africa should they adopt this Bill. This threat of unilateral trade sanctions was premised on the Bill having a ‘lack of IP protection and enforcement’ as its proposed system of fair use is considered ‘too broad’ by the US, despite the US itself utilising a system of fair use in its IP framework (as has been the case for many decades).³²

While the above example does not relate to the WTO authorising trade sanctions *per se*, it is important to note that the WTO DSB has long concluded that even though such unilateral threats of trade sanctions made by the US ‘constitute a *prima facie* violation of [the TRIPS Agreement]’, they are ‘not inconsistent with US obligations under the WTO’ and are therefore acceptable.³³

It is true that this acceptance by the WTO DSB was ‘based in full or in part’ on the US administration undertaking that it would ‘base any [trade sanctioning] determination’ of a WTO violation on ‘panel or Appellate Body findings adopted by the DSB’ and only sanction countries with ‘authority from the DSB to retaliate’. However, the reasoning of the DSB is rather challenging to follow for such an undertaking still enables the US to unilaterally sanction on the basis of its own interpretation of Panel or Appellate Body findings, and places the onus on the sanctioned country to retaliate with a DSB action after the fact. It is also difficult to understand how a *prima facie* violation on the TRIPS Agreement may be condoned on the basis of what is essentially a ‘promise to behave’ while doing so. That said promise has arguably been broken multiple times since the original judgement – such as in the US’s sanctioning of Ukraine for matters including lack of IP enforcement without engaging WTO dispute resolution, unilaterally raising tariffs and other trade barriers in response to matters not brought before the WTO with regard to China, and potentially in the above-mentioned example of South Africa adds to this obscurity.³⁴

The ability to implement trade sanctions which are either expressly or implicitly condoned by the WTO make the practicalities surrounding the ‘pro-development’ lens argument strenuous. Therefore, while such suggestions are indeed useful within a flawed system, their usefulness is limited and does not address the fundamental concern, namely how to go about fixing the system itself. The emphasis in these suggestions lies with the Global South to ‘make the best of a bad situation’ rather than calling on the Global North to be the actionable party in realising a more reflective international IP framework.

3. Removal of the TRIPS Agreement

Story has argued that the international copyright framework ought to be ‘repealed and a new framework be established on radically different grounds’ in light of its

‘negative effects on countries of the South and its citizens’.³⁵ The author premises this extreme position upon two primary claims: first, that copyright itself ‘represents a coercive cultural and legal incursion onto the terrain of countries of the South’ whom, he claims, did not recognise such ‘social constructs’ prior to Western implantation through colonisation; and second, that the power inequality between corporate copyright owners in ‘rich countries’ and users in ‘poorer countries’ (to use the author’s choice of terminology) evidences that copyright is inherently incapable of being balanced or balanceable in the international arena.

It is respectfully submitted that both these claims are incorrect. As detailed above, traditional communities within the Global South did and still do recognise individual proprietary rights over intellectual property – that this is underreported and subsequently often overlooked by scholars in the West does not make it any less so. It is submitted that copyright exclusivity is neither foreign to the Global South, nor is it inherently incapable of being balanced – indeed, such a nihilistic argument misses the very heart of this article, namely that such a balance is possible and requires the centralisation of the public interest in a manner better representative of the Global South.

4. Removal of the TRIPS Agreement from the WTO

According to Khor, WTO members should ‘seriously reconsider whether the TRIPS Agreement belongs in the WTO’.³⁶ Khor is, perhaps, the most outspoken critic of the WTO and its administration of the TRIPS Agreement,³⁷ though which body would be better placed to administer the TRIPS Agreement is unclear. While the interplay between UNESCO and the WTO, or cultural heritage and IP rights, have been examined in literature,³⁸ the potential for the TRIPS Agreement to be administered by UNESCO has not. It is true that there may be political difficulties with adopting this position,³⁹ but it is at the very least an option worthy of academic exploration.

Many UN agencies subscribe to progressive development theories that are informed by human rights considerations. This is useful in terms of the arguments put forth by Yu and Beiter whereby the interpretation of the TRIPS Agreement would be best undertaken through a pro-development lens informed by international human rights law.

³⁵ Alan Story, ‘Burn Berne: Why the leading international copyright convention must be repealed’ (2003) 40 *Houston Law Review* 763.

³⁶ Martin Khor, ‘Rethinking Intellectual Property Rights and TRIPS’ in Drahos and Mayne (n 23) 211–212.

³⁷ Martin Khor, ‘Rethinking Liberalisation and Reforming the WTO’ (Presentation at the World Economic Forum at Davos, 28 January 2000) <<https://web.archive.org/web/20061006063924/http://www.twinside.org.sg/title/davos2-cn.htm>> accessed 20 April 2021; Martin Khor, ‘Chapter 3.6: How the South is Getting a Raw Deal at the WTO’ in Robin Broad (ed), *Global Backlash: Citizen Initiatives for a Just World Economy* (Rowman and Littlefield 2002) 154.

³⁸ For example, see: Janet Blake, *International Cultural Heritage Law* (Oxford University Press 2015); Tomer Broude, ‘Taking “Trade and Culture” Seriously: Geographical Indications and Cultural Protection in WTO Law’ (2005) 26 *University of Pennsylvania Journal of International Law* 1; Michael Hahn, ‘A Clash of Cultures? The UNESCO Diversity Convention and International Trade Law’ (2006) 9 *Journal of International Economic Law* 515.

³⁹ Klaus Hufner, ‘The Financial Crisis of UNESCO after 2011: Political Reactions and Organizational Consequences’ (2017) 8 *Global Policy* 96.

³² Office of the United States Trade Representative, ‘USTR Announces GSP Enforcement Actions and Successes for Seven Countries’ (USTR, 25 October 2019) <<https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/october/ustr-announces-gsp-enforcement>> accessed 4 April 2021.

³³ World Trade Organization, ‘DS152: United States — Sections 301–310 of the Trade Act 1974’ available at <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds152_e.htm> accessed 20 April 2021.

³⁴ World Trade Organization, ‘US “Section 301” action against China’s intellectual property regime questioned at WTO Goods Council’ <https://www.wto.org/english/news_e/news18_e/good_28mar18_e.htm> accessed 20 April 2021.

UNESCO is not a free actor on the world stage and is bound, as are the other UN Specialized Agencies, by their Constitutions.⁴⁰ The Constitution of UNESCO, signed on 16 November 1945, came into force on 4 November 1946 after ratification by 20 countries.⁴¹ According to the Constitution, the primary purpose of UNESCO is:

‘[T]o contribute to peace and security by promoting collaboration among the nations through education, science and culture in order to further universal respect for justice, for the rule of law and for the human rights and fundamental freedoms which are affirmed [...] by the Charter of the United Nations.’⁴²

UNESCO’s constitution identifies certain means of realising this purpose, including recommending ‘such international agreements as may be necessary to promote the free flow of ideas by word and image’. UNESCO’s constitution does recognise and endorse the preservation of ‘the independence, integrity and fruitful diversity of the cultures and education systems of the States Members of the Organization’. Virtually all members of the WTO are also UNESCO members.

Culture has always been a cornerstone of UNESCO, the pre-existing relationship between culture and trade being recognised through various trade regimes. The protection of culture and related human rights largely falls under the ‘jurisdiction’ of UNESCO. There is a large degree of overlap between types of works protected under the TRIPS Agreement and those already protected under UNESCO. The TRIPS Agreement regulates in Art. XIV the trade in and protection of literary works, films, broadcasting programs, sound recordings or music, performances. These goods fall under the scope of cultural goods according to UNESCO’s Framework for Cultural Statistics (launched in 2009) which defines cultural goods as conveying ideas and ways of life and included books, magazines, multimedia products, software, recordings, films, videos, audio-visual programs, crafts and fashion. The link between cultural goods and commercial value is also well-established, for example copyright in traditional performing arts, and there therefore exists some degree of overlap between the types of works protected by UNESCO and the WTO at present.⁴³

In terms of enforcement mechanisms, UNESCO has been criticised as being ‘devoid of real and effective authority’ or ‘soft’ and ‘loose’ due to its lack of ‘teeth’.⁴⁴ For example, UNESCO offers to its Member States a mediation and conciliation service through its Intergovernmental Committee for Promoting the Return

of Cultural Property (ICPRCP). In this case, the main focus is the return of looted cultural property to its country of origin or its restitution in case of illicit appropriation. However, there is no reason why this mechanism cannot be extended to cover the complete ambit of disputes arising from the TRIPS Agreement. Mediation and arbitration procedures – as offered by UNESCO – differ greatly, though share some common threads and benefits which lend themselves to the hypothesis of this article. Firstly, they allow for a greater degree of flexibility and creativity in their approach to dispute resolution. This increased flexibility is particularly desirable when it comes to the application of rules to the Global South. Secondly, they are based to some extent on consensus between the parties (with the absence of trade sanctions) and involve an impartial figurehead in the form of a mediator/arbitrator/expert. Thirdly, they provide a much greater opportunity for preserving long-term relationships between member states and ensuring that each party feels equally ‘heard’ on the world stage. Finally, they can potentially offer opportunities for speedier and less costly resolutions.⁴⁵

It is also important to note that UNESCO has overlapped with the ambit of various other IP instruments. For example, the Universal Copyright Convention was developed by UNESCO as an alternative to the Berne Convention for those states that disagreed with aspects of the Berne Convention but still wished to participate in some form of multilateral copyright protection, which included the Global South and countries like the United States.⁴⁶ Further instruments such as the Convention for the Safeguarding of Intangible Cultural Heritage 2003 and the Convention on the Protection and Promotion of the Diversity of Cultural Expressions 2005 add weight to the argument that UNESCO has the ability to easily subsume the content currently administered by the WTO. The same may be argued in terms of other forms of IP such as patents, which could be considered an extension of UNESCO’s science mandate.

IV. Conclusion

International IP frameworks play an important role in the setting, standardising and securing of basic IP norms and standards across much of the world. This uniformity is necessary in order to achieve the wide-reaching, important and fundamental goals upon which the system of IP is premised. However, as has been argued in this article, the current frameworks have not been able to adequately reflect and incorporate the centrality of the public interest as it relates to copyright exclusivity which is a hallmark of many indigenous communities located within the

⁴⁰ Patrick J O’Keefe, *Protecting Cultural Objects: Before and After 1970* (Institute of Art and Law Ltd. 2017).

⁴¹ In alphabetical order: Australia, Brazil, Canada, China, Czechoslovakia, Denmark, Dominican Republic, Egypt, France, Greece, India, Lebanon, Mexico, New Zealand, Norway, Saudi Arabia, South Africa, Turkey, United Kingdom, United States.

⁴² art 1(1).

⁴³ Tomer Broude, ‘Mapping the potential interactions between UNESCO’s intangible cultural heritage regime and world trade law’ (2018) 25 *International Journal of Cultural Property* 419; O’Keefe (n 40).

⁴⁴ Zara Ruiz Romero, ‘Lawfulness and ethics around cultural property auctions: the case of the Barbier-Mueller Pre-Columbian collection’ (2020) 27 *International Journal of Cultural Property* 397; Simon Mackenzie and Donna Yates, ‘Chapter 6: Crime, corruption, and collateral damage: Large infrastructure projects as a threat to cultural heritage’ in T Wing Lo and others (eds), *Organized Crime and Corruption Across Borders Exploring the Belt and Road Initiative* (Routledge 2020).

⁴⁵ Peter Quayle and Xuan Gao, *International Organizations and the Promotion of Effective Dispute Resolution: AIIB Yearbook of International Law 2019* (1st edn, Brill Nijhoff 2019); Carrie J Menkel Meadow and others, *Dispute Resolution: Beyond the Adversarial Model* (1st edn, Wolters Kluwer Law & Business 2018); Emily Gould, ‘Resolving art-related disputes: the use of Alternative Dispute Resolution mechanisms’ (*Institute of Art & Law*, 19 June 2018) <<https://ial.uk.com/resolving-art-related-disputes-the-use-of-alternative-dispute-resolution-mechanisms/>> accessed 20 April 2021.

⁴⁶ Kelsey Martin Mott, ‘The Relationship between the Berne Convention and the Universal Copyright Convention’ (1967) 11 *Pat. Trademark & Copy. J. Res. & Ed* 306; Hamish R Sandison, ‘The Berne Convention and the Universal Copyright Convention: The American Experience’ (1987) 11 *The Columbia Journal of Law & the Arts* 89; Joseph S Dubin, ‘The Universal Copyright Convention’ (1954) 42 *California Law Review* 89.

historically and currently socio-politically oppressed Global South. By placing the broader, non-commercial communal interest at the heart of discussions around IP exclusivity as is done within indigenous societies in the Global South, a conceptual shift is able to take place within the global consciousness. This shift enables the international IP community to recognise that the communal interest need not simply be seen as a means of justifying limitations to and exceptions from the accepted norm of exclusivity, but in fact may be utilised so as to justify the creation of a more inclusive and globally representative framework within which to situate the norm. One possi-

ble way to address this is by moving the TRIPS Agreement from the ambit of the WTO to UNESCO, but this is of course only one suggestion – it is hoped this article will, by highlighting said issue, encourage other stakeholders to come forward with further suggestions.

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